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HONORABLE MARY K. DIMKE

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

R.W., individually and on behalf  
of his marital community,

Plaintiff,

v.

COLUMBIA BASIN COLLEGE,  
a public institution of higher  
education, RALPH REAGAN, in  
his official and individual  
capacities, LEE THORNTON, in  
his individual capacity,  
REBEKAH WOODS, in her  
official capacity

Defendants.

NO. 4:18-05089-MKD

DEFENDANTS' REPLY IN  
SUPPORT OF  
DEFENDANTS' MOTION  
FOR SUMMARY  
JUDGMENT

June 18, 2024  
10:00 a.m.  
Richland Courtroom 189

Plaintiff misunderstands the Defendants' argument and the burden of proof. It is actually the plaintiff that has failed to point to case law indicating that a person cannot react to speech that discloses a threat for safety because it is made to a doctor or designated crisis responder. Such a rule would be unthinkable. The whole point of the duty to warn is so the potential victim *can react*. To place a First Amendment bar on state actor's ability to protect themselves and others is inappropriate,

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1 especially with the escalating violence seen on campuses.<sup>1</sup> Thus, whether it is  
 2 because the true threat doctrine or student speech doctrine applies or because under  
 3 basic First Amendment principles in cases like *Oyama* control, Colleges and  
 4 Universities can react to potential threats to their students and faculty by enacting  
 5 reasonable, common-sense processes around emergency interim trespass and the  
 6 student's return to the program. Additionally, the facts set forth in Defendants'  
 7 motion are largely undisputed and so judgment as a matter of law is appropriate.

## 8 I. ARGUMENT

### 9 A. Plaintiff's Speech Presented a Threat to the College Community

10 Statements of serious homicidal ideation regardless of who the statements  
 11 are made to have the effect of causing significant fear in the potential victims of  
 12 the homicide and so are true threats. This position is supported by *Counterman*,  
 13 \_\_\_\_\_

14 <sup>1</sup> Sadly, the news has numerous examples of students or former students  
 15 killing their professors. *See, e.g.,* Blake, Jessica, "Arizona Reaches Settlement  
 16 with Family of Murdered Professor," Inside Higher Ed (Jan. 10, 2024) (available  
 17 at [https://www.insidehighered.com/news/quick-takes/2024/01/10/u-ariz-](https://www.insidehighered.com/news/quick-takes/2024/01/10/u-ariz-reaches-settlement-family-murdered-professor)  
 18 [reaches-settlement-family-murdered-professor](https://www.insidehighered.com/news/quick-takes/2024/01/10/u-ariz-reaches-settlement-family-murdered-professor)); Levenson Michael, "U.N.C.  
 19 Graduate Student Is Charged in Fatal Shooting of Professor," New York Times  
 20 (Aug. 29, 2023) (available at [https://www.nytimes.com/2023/08/29/us/unc-](https://www.nytimes.com/2023/08/29/us/unc-chapel-hill-shooting-gunman-charges.html)  
 21 [chapel-hill-shooting-gunman-charges.html](https://www.nytimes.com/2023/08/29/us/unc-chapel-hill-shooting-gunman-charges.html)).  
 22

1 which recognized “a statement can count as such a threat based solely on its  
 2 objective content.” *Counterman v. Colorado*, 600 U.S. 66, 72 (2023). While  
 3 *Counterman* applied the recklessness standard in the criminal context, it did  
 4 nothing with regard to the civil context and so cases like *O’Brien v. Welty*, 818  
 5 F.3d 920 (9th Cir. 2016) still control.

6 Plaintiff continues to misread *O’Brien v. Welty*, suggesting now that the  
 7 opinion has nothing to do with speech and only deals with conduct. Plaintiff then  
 8 incongruously goes on to discuss how it is a forum case. ECF No. 310 at 6. Again,  
 9 consulting the opinion undercuts Plaintiff’s argument. The case deals with  
 10 conduct *and speech*. *O’Brien*, 818 F.3d at 932 (discussing what happened was  
 11 the plaintiff there “asking hostile questions” of professors in their offices, and  
 12 refusing to leave when asked). Indeed, the court references speech numerous  
 13 times in the opinion and opens the relevant section of the opinion discussing how  
 14 a regulation may be unconstitutionally applied to “protected speech” and  
 15 continues to discuss how the University could “regulate speech.” *Id.* at 931.  
 16 Additionally, Plaintiff is incorrect in suggesting the Court’s discussion of how  
 17 the University could handle threatening speech is limited to actions regarding  
 18 conduct or to do with the forum of the speech. The Court specifically referenced  
 19 *Elonis v. United States*, 575 U.S. 723 (2015) and *Virginia v. Black*, 538 U.S. 343  
 20 (2003). Neither of those cases are forum speech cases; rather, both deal with  
 21 threats. *See generally id.* In short, the Ninth Circuit considered it a speech case  
 22

1 and specifically referenced and rejected a subjective intent requirement in the  
2 University setting.<sup>2</sup>

3 **B. The Student Speech Doctrine at Least with Regard to Threats Should**  
4 **Apply to the Higher Education Setting**

5 The parties agree that the Ninth Circuit has never had occasion to adopt  
6 the student speech doctrine in the College or University context. However, the  
7 Ninth Circuit expressly indicated they were influenced by it in *Oyama v. Univ.*  
8 *of Hawaii*, 813 F.3d 850, 860–61 (9th Cir. 2015), and the circuit expressly  
9 recognized that whether a student was a threat was significant in *O’Brien v.*  
10 *Welty*, 818 F.3d at 935 (“Specifically, our holding is by no means intended to  
11 protect from discipline students whose speech or conduct may reasonably be seen  
12 as threatening or constituting a danger to members of the university  
13 community.”) These cases support that at least the aspect of the student speech  
14 doctrine dealing with threats should apply to college campuses.

15 \_\_\_\_\_  
16 <sup>2</sup> Nor is the speech versus conduct distinction largely relevant because  
17 “The First Amendment affords protection to symbolic or expressive conduct as  
18 well as to actual speech.” *Virginia*, 538 U.S. at 358; *see also Porter v. Martinez*,  
19 68 F.4th 429, 438 (9th Cir. 2023). (“Conduct—such as burning a flag, wearing a  
20 black armband, or staging a sit-in—may be sufficiently imbued with elements of  
21 communication to fall within the scope of the First and Fourteenth Amendments.”  
22 (Internal quotation marks omitted))

1 *LaVine v. Blaine School District* while helpful does not end the inquiry. In  
 2 *LaVine*, which dealt with a student who wrote a poem depicting school violence,  
 3 the school came to the conclusion that there was no actual safety threat. *Id.* at 992  
 4 (noting “the school had allowed James to return to classes *and satisfied itself that*  
 5 *James was not a threat to himself or others*” (emphasis added)). Additionally,  
 6 there both the deputy sheriff who interviewed the student and the doctor that the  
 7 deputy consulted did not have enough information to involuntarily commit him.  
 8 257 F.3d at 985, 991. Finally, there was an indication that the district had placed  
 9 “negative documentation” in the students file that could be taken out of context  
 10 because it did not reference “the later, ameliorating events and thus went beyond  
 11 the school’s legitimate documentation needs.” *Id.* at 992. In contrast, in R.W.’s  
 12 case there was an actual threat. R.W. was not writing a fictional story or a poem  
 13 describing acts of violence, *he told his medical professionals that he was, in fact,*  
 14 *repeatedly thinking about committing acts of violence.* And here, a designated  
 15 crisis responder did believe she had enough to involuntarily commit him. Thus,  
 16 R.W. is completely incorrect in indicating that the college learned he “did not  
 17 pose a threat to the school.” ECF No. 310 at 10. In fact, no one could assure the  
 18 College of that fact, and it was undisputedly the stress from his program that had  
 19 led to R.W. considering violent homicide. Plaintiff’s references to the record are  
 20 not to the contrary; they recognized improvement, in part from not being  
 21 subjected to the stress of his program, not a lack of threat in the first instance.  
 22

1 ECF No. 310 at 11. Additionally, the trial testimony here clarified the deposition  
 2 testimony on these specific points. Transcript at 712–13, 821–22. Nor has  
 3 Plaintiff established his burden in suggesting there is out-of-context  
 4 documentation in his file regarding the incidents that could affect him in the  
 5 future.

6 Plaintiff acknowledges the possibility that the interim trespass was  
 7 appropriate “as a non-punitive and temporary safety measure,” but goes on to  
 8 fault the College for the actions taken after the investigation was concluded as  
 9 “disciplinary action and sanctions levied against R.W. for his speech.” ECF No.  
 10 310 at 12. Plaintiff is correct as to the former and incorrect as to the latter. Yes,  
 11 the College could react to speech by keeping him away temporarily, and yes it  
 12 could also impose upon him reasonable, common-sense requirements for his  
 13 return, in the interest of student and faculty safety. That is all that it did. Plaintiff’s  
 14 argument amounts to a process argument, effectively arguing that the College  
 15 could *do this* but could not do it *this way*, e.g. through the student conduct  
 16 process. This is made more apparent by Plaintiff’s complete failure to address  
 17 *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016), which removed a nursing student  
 18 based on professionalism for off-campus speech that contained a threat, in part  
 19 in reliance on *Oyama*. *See* 840 F.3d at 531–32. The Eighth Circuit there noted  
 20 that “Keefe’s threats could have prompted disciplinary proceeding” but the  
 21 administrators instead addressed it through the professionalism component of the  
 22

1 program. *Id.* Here, the administrators did the opposite and addressed it through  
 2 the student conduct process not through the professionalism process, but that  
 3 minor process difference does not itself amount to a First Amendment violation.  
 4 Even if the College had done the same thing, but outside the student conduct  
 5 process it would have had the same effect. Thus, Plaintiff has not met his burden  
 6 to show a First Amendment violation for which he is entitled to injunctive relief.

## 7 II. CONCLUSION

8 The Court should grant summary judgment to the Defendants, the Plaintiff  
 9 acknowledges that the vast majority of facts are undisputed. *See* ECF 311. The  
 10 College officials here reasonably responded to a complex and sensitive situation  
 11 where a student confessed to persistently thinking about killing his professors.  
 12 The officials temporarily trespassed him and then creating a path to return to his  
 13 program that required open communication about his mental health. This did not  
 14 violate the First Amendment as a matter of law.

15 DATED this 6th day of May, 2024.

16 ROBERT W. FERGUSON  
 17 Attorney General

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**PROOF OF SERVICE**

I certify that I electronically filed the above document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 6th day of May, 2024, at Spokane, Washington.

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